avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses."[24] Moreover, the 1993 Budget Act, apart from Section 309(j), encourages the reallocation of for new frequencies for emerging technologies.[25] Pioneer's preferences are uniquely suited to fulfill Congress' goal for insuring new and innovative technologies, and offers the most direct method for assuring some diversity of licensees. As explained above, many pioneers would likely enter the competitive bidding process rich in experience but poor in capital and so would be in a disadvantageous position to pay the competitive price for a license. However, by granting licenses to innovators apart from the competitive bidding process, small businesses and entrepreneurial companies are placed on a level playing field with the giants in the communications industry.

Omnipoint is an excellent example of how pioneer's preferences help entrepreneurs to establish a foothold in personal communications service. As the Commission's own Small business Advisory Committee stated in its Market Overview:

> the universe of potential service providers is significantly constrained by increasing concentration of ownership and undercapitalization. In our view, the introduction of competitive bidding procedures is more

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[24] Id. at § 309(j)(3)(B).

[25] See 47 U.S.C. § 915(b)(2)(A) (Commission's report to Congress shall provide that new technologies are assigned reallocated spectrum); 47 U.S.C. § 917(b) (frequencies used by Government may be allocated for non-government new technology users).

likely to compound, rather than relax, these impediments to market entry.[26]

In Omnipoint's case, pioneer's preferences encouraged diversity of ownership by allowing an innovator a chance to participate in the market for PCS.

IV. IF THE COMMISSION DECIDES TO MODIFY THE PIONEER'S PREFERENCE RULES, TENTATIVE PCS PIONEER'S PREFERENCE HOLDERS ARE ENTITLED TO DISPOSITION UNDER THE EXISTING RULES.

The answer to the Commission's second set of issues is also very clear -- any change or repeal of the Commission's pioneer's preference rules may only be applied prospectively and not to tentative PCS preference holders. There is no legitimate basis, in equity or at law, to apply new rules retroactively to those who were given the incentive by the Commission to follow the existing rules, made substantial investments and sacrifices based on them, and who were told that they had reached the goal.

A. It Is Unfair For the Commission To Apply New Rules To Tentative PCS Pioneer's Preference Holders.

The Commission properly concluded that equity requires that any change in or repeal of the pioneer's preference program should not be applied retroactively to VITA and Mtel, the two applicants who received pioneer's preferences prior to the enactment of the auction legislation. NPRM at ¶ 18. There is no principled basis, however, for distinguishing between the

[26]Report of the FCC Small Business Advisory Committee to the Federal Communications Commission Regarding GEN Docket 90-314, 1, September 15, 1993.

preferences already awarded to Mtel and VITA and the tentative 2GHz PCS preferences with respect to this issue.

Omnipoint, and presumably the other PCS tentative grantees, followed the pioneer's preference rules. These rules, which were proposed in 1990 and adopted after notice and public comment in 1991, are lawful, have become final and are consistent with the Commission's authority under Section 157 of the Communications Act. The PCS pioneers complied with the rules and are entitled to receive disposition under these rules.

Omnipoint conducted and documented extensive and expensive experimentation under the program. It participated in the Commission's rulemakings for the implementation of a framework for PCS, commented on the work done by others and arduously defended its own work. It disclosed its innovations to its competitors and relied on the Commission's rules in making investment and business development decisions. Omnipoint and other participants in the program were instrumental in developing meaningful debate on the new PCS technologies and launching the PCS industry in this country. In such efforts, the fueling factor was the potential availability of "a license not subject to competing applications."

Once tentative preference awards were made, the Commission irrevocably created an entitlement to formal consideration under the existing rules. Omnipoint and its investors have relied on the tentative preference in seeking additional financial infusions for the company's development work and in incurring additional expenditures in implementing the technology. In these

circumstances, fairness requires that the final PCS preference awards be determined under the existing rules.

Those of us who sacrificed our families, our money, and risked the faith of our investors, did so with the knowledge that the award for a pioneers preference winner was "to guarantee the innovating party a license in the new service . . . by permitting the recipient of a pioneer's preference to file a license application without being subject to competing applications.[27] The Commission left no doubt as to what this meant throughout the pioneer's preference and PCS dockets:

> "[A]ny other approach that would maintain a significant potential that another party could be awarded the right to operate and the innovator be foreclosed, would severely limit the value of the preference and undercut its public interest purpose.[28]

The risk/return tradeoff is made by the entrepreneur at the point in time when the opportunity is offered, but the results are unknown. Once the achievement is fulfilled, it is grossly unfair for anyone to say that perhaps the reward should be eliminated or diminished, because no one can ever go back in time and diminish the risk, nor return what was sacrificed.

Venture capitalists live by this relationship, because without the *potential* for an unlimited upside no one would take such extraordinary risks in which the entire investment could be lost. Anyone who has ever bought stock in a company understands this fundamental risk/return relationship at least at some monetary

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[27] Pioneer's Preference Report and Order, (emphasis added).

[28] Pioneer's Preference Report and Order (emphasis added).

level. Any stockholder would be outraged if the government tried to lower a stock's actual return after the risk of loss had been taken simply because the government thought the return was too high.

This same risk/return covenant also exists on a more personal level. Especially in small companies, the sacrifices are also measured in terms of the 16 hour days, the salary cuts, the life changing economic risks, the weeks and then months away from home, and the relentless loss of time with family. They are measured by those around you by the missed birthdays and anniversaries, the soccer games you didn't see, the ballet award you couldn't be there for, and the stress of living on the edge of a cliff. The point is not that someone deserves something just for making such sacrifices. Many people make these sacrifices. The point is that when you induce people to do this for the potential of a particular award, you cannot go back on that promise if you determine they achieved what you asked of them. Nothing can ever give back those sorts of sacrifices.

The inequity to the tentative preference holders is also that, having invested themselves into the Commission's preference program, a change in the rules after the final preference decisions are due has a retroactive effect. Retroactive application of an agency's policy is generally met with great skepticism by the courts:

> [c]ourts have long hesitated to permit retroactive rulemaking and have noted its troubling nature. When parties rely on an admittedly lawful regulation and plan

their activities accordingly, retroactive modification or rescission of the regulation can cause great mischief.[29]

Three factors are used to examine a retroactive rulemaking: (1) justifiable reliance of those parties on past agency practice; (2) the degree of hardship that retroactivity would impose on the affected parties; and (3) the statutory interest in retroactive application of the rule.[30] The U.S. Supreme Court has cautioned that "[e]ven where some substantial justification for retroactive rulemaking is presented, courts should be reluctant to find such authority absent an statutory right."[31]

The equities tip decidedly against retroactive application of any pioneer's preference rule changes. First, while the Bowen Court and the third factor of the Consolidated Freightways test favor a statutory basis for retroactivity, the 1993 Budget Act provides no such support. To the contrary, as discussed above, Section 309(j) of the 1993 Budget Act and Section 157 of the Communications Act express a legislative preference for the promotion of new services. Congress gave a "green light" to the pioneer's preference program in the 1993 Budget Act.

Second, if the pioneer's program is repealed or the allocation is outside the "Big" PCS allocation for which the tentative holders petitioned, (i.e. now 30 MHz), those parties that would otherwise

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[29]Yakima Valley Cablevision, Inc. v. FCC, 794 F.2d 737, 745-46 (D.C. Cir. 1986).

[30]Consolidated Freightways v. NLRB, 892 F.2d 1052, 1058 (D.C. Cir. 1989).

[31]Bowen v. Georgetown University Hospital, 488 U.S. 204, 208-209 (1988).

have been finalized under the existing rules would suffer great hardship. The retroactive application of new rules would result in:

* significant instability for pioneer's investors and lenders. Unexpected competitive bidding costs would radically alter the cost structure of the pioneer's venture and dramatically reduce investment expectations.

* competition for licenses with companies that would have an unfair competitive advantage. The public nature of the pioneer's preference proceedings allows auction participants who spent nothing on innovation or disclosed nothing with respect to their experiments to benefit from the disclosures of the pioneer's preference participants.

* loss of costs sunk into the pioneer's preference process. The Commission itself has encouraged tentative holders to expend significant amounts of time and money in proposals, requests, and supplemental showings for a pioneer's preference license.

In the pioneer's preference rules, the Commission itself acknowledged the need to provide stability to the program:

> If we defer this decision to the report and order stage of the proceeding, it will prolong the regulatory uncertainty for the innovator and thereby have a chilling effect on investor's willingness to provide financial support. Our general policy of awarding a preference even if the report and order modifies the proposed service to some extent ... will tend to lessen the likelihood that an initial determination to grant a preference would mislead the pioneer and the financial community.

Pioneer's Preference Report and Order, 6 FCC Rcd at § 61. (emphasis added). By applying any new rules retroactively, the Commission would be creating the very same hardship that it initially sought to avoid.

Lastly, it cannot be denied that Omnipoint and the other tentative preference holders have justifiably relied on the agency's practice. Tentative pioneer's preference holders have

acted in accordance with both the existing pioneer's preference rules and the Commission's initial determination that each tentative holder merits a 30 MHz preference.[32] As discussed in Section I, supra, since the pioneer's preference program was adopted, the Commission's own actions have reinforced the preference proponents' reliance on the continued availability of the program and created an incentive to disclose their innovations. The Commission has since then twice reaffirmed its pioneer's preference rules.

During the course of its deliberations, the Commission has not once suggested that the underlying policies behind the program have changed or hinted at the possibility that the program may be eliminated. Much to the contrary, during Congressional consideration of the auction legislation, the Commission openly finalized the preference grant to Mtel and in a separate proceeding affirmed the legality of the pioneer's preference program. It is hard to imagine that a tentative preference holder, after an exhausting race for the pioneer's tentative preference and witnessing the Commission subsequently reaffirm the policy and finalize other tentative winners in parallel dockets, would not reasonably expect that the Commission believed in pioneers and would not retroactively eliminate or diminish preferences.

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[32]This initial determination involved a review of the proposed innovations that each tentative holder had contributed and would contribute under its proposal. Tentative Decision, 7 FCC Rcd at ¶ 3. The Commission, therefore, was acutely aware that the tentative awardees would continue to undertake significant investments in reliance on the existing pioneer's preference rules.

The problem with retroactivity in this case is highly compounded by the fact that, in withholding the final awards on the PCS preferences, the Commission violated its own rules. 47 C.F.R. § 1.402(d). The tentative PCS awards have been in place for over one year. The PCS rules have been promulgated. Yet, final awards have not been made.

The Commission postponed final pioneer's preference grants for PCS on the grounds that the PCS rules presented complex issues and it had not fully considered the relationship between the competitive bidding legislation and pioneer's preferences. PCS Second Report and Order at n.6. This explanation does not provide a solid basis for not following the pioneer's preference rules. The narrowband PCS rulemaking presented the exact same complex issues and yet the Commission was able to make a final decision to award Mtel a pioneer's preference. Thus, because the Commission arbitrarily chose to deal with narrowband before broadband PCS pioneers, the broadband PCS pioneers are given totally different treatment than Mtel. With respect to any confusion that the 1993 Budget Act may have added to pioneer's preferences decisions, the Commission was fully aware of this legislation prior to its enactment.

B. As a Matter of Law, the Pioneers Are Entitled to a Disposition Under Existing Rules.

The Commission's own rules dictate that the tentative preference holders were entitled to a final decision under the existing preference rules on September 23, 1993, when the Commission adopted it~ PCS Second Report and Order. Section

1.402(d) plainly states: "[a] final determination on a request for a pioneer's preference and its scope will be made at the time of adoption, if any, of a report and order adopting new rules.[33] As a matter of administrative law, the Commission could not simply decide to ignore its own rules by not reaching a final decision on September 23rd.

In FCC v. Reuters,[34] the D.C. Circuit Court of Appeals made this point clear to the Commission: [a] precept which lies at the foundation of the modern administrative state is that agencies must abide by their rules and regulations."[35] The Reuters court further explained to the Commission that

> ad hoc departures from those rules, even to achieve laudable aims, cannot be sanctioned. . .[simply stated, rules are rules, and fidelity to the rules which have been properly promulgated, consistent with applicable statutory requirements, is required of those to whom Congress has entrusted the regulatory missions of modern life.[36]

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[33]47 C.F.R. § 1.402(d).

[34]781 F.2d 946 (D.C. Cir. 1986).

[35]Id.

[36]Id. at 950-51; See also Algonquin Gas Transmission Co. v. F.E.R.C., 948 F.2d 1305, 1315 (D.C. Cir. 1991). ("It is axiomatic that 'an agency is legally bound to respect its own regulations and commits procedural erroer if it fails to abide them'" quoting Esch v. Yeutter, 876 F.2d 976, 99 (D.C. Cir. 1989)).

The Commission's own decisions have adopted this principle of administrative law. In fact, the Commission has cited the Reuters case many times for this general proposition.[37]

The Commission's decision not to make a final decision on September 23rd, even if it had been accompanied with a stronger explanation, is still not in accordance with Section 1.402(d) and is at odds with the Reuters decision. The only way to remedy the hardships that are resulting from the agency's determination to ignore its own rules is expedited resolution of the PCS pioneer's preference grants. In this regard, Omnipoint joins in and incorporates the views expressed in American Personal Communication's "Request For Separate and Expedited Treatment of Existing Pioneer Preference Issues", filed October 28, 1993.

C. The PCS Pioneer's Should Receive The Preference They Applied For.

For the reasons explained in detail in Omnipoint's September 29, 1993 filing, Omnipoint respectfully submits that the Commission should make the frequency allotment for PCS pioneers based on their petitions to offer "Big PCS." It would be counterproductive for the Commission to award a marginalized amount of spectrum to those it recognizes as pioneers. In Omnipoint's case, for example, a specific request for a 30 MHz license at 1850 to 1990 MHz was made during the pioneer's

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[37]See, In re Radio Associates, Memorandum Opinion and Order, 6 FCC Rcd 2094 (1991); In the Matter of Multi-Point Television Distributors, Inc., Order on Reconsideration, 5 FCC Rcd 519 (1990).

preference application process.[38] Omnipoint requested a 30 MHz allocation for specific technical reasons related to the use of its innovative spread spectrum architecture as well as its unique service offering. Its system provides for variable "bandwidth on demand" for voice, digitized video and multimedia, and high speed data, which was optimized for use with 30 MHz or more.

The NPRM on PCS adopted on July 16, 1992 proposed 30MHz licenses. The October 8, 1992 NPRM on the PCS pioneers tentatively awarded these 30MHz licenses to the pioneers. The September 23, 1993 Report and Order on PCS finalized 102 30MHz licenses at 1850 to 1990 MHz. There is no justification for awarding a lesser amount than was petitioned for or tentatively awarded. The Commission, for example, did not marginalize Mtel's petition and tentative award for 50Khz by finalizing it for one of the 12.5Khz narrowband allocations. Therefore, the Commission should not use this proceeding to justify a lesser grant for the tentative 2GHz PCS pioneers.[39]

V. CONCLUSION

Auctions and pioneer's preferences can work together to produce a spectrum allocation process that achieves the multiple goals of revenue generation, diversity, and innovation all in the public interest. Omnipoint submits that the public interest is not served by modifying the pioneer's preference program in any

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[38]See Omnipoint's filing on June 25, 1992 at 16.

[39]If the Commission determines that the compromise proposed by some that carving out the core BTA(s) within the 30MHz MTA is an acceptable solution, then Omnipoint would accept this as well.

material way.[40] Omnipoint respectfully requests that the Commission apply the existing rules to tentative pioneer's preference holders and that it reach a final decision on their preferences on an expedited basis.

Respectfully Submitted,

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November 15, 1993

[40]Omnipoint has no comment on most of the administrative amendments proposed in paragraphs 14 through 16 of the NPRM. With respect to the recommendation in paragraph 17, Omnipoint agrees with the Commission.

The Value of Pioneer's Preferences in Stimulating PCS Experimentation